

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
)	
Implementation of Section 304 of the)	CS Docket No. 97-80
Telecommunications Act of 1996)	
)	
Commercial Availability of Navigation Devices)	
)	
Compatibility Between Cable Systems and)	PP Docket No. 00-67
Consumer Electronics Equipment)	

**Comments of
The Recording Industry Association of America
In Partial Support of Joint Petition for Reconsideration
of the National Music Publishers' Association, et al.**

The Recording Industry Association of America, Inc. (“RIAA”), pursuant to Section 1.429 of the Commission’s Rules, hereby submits these comments in support of the Joint Petition of the National Music Publishers’ Association (“NMPA”), the American Society of Composers, Authors and Publishers (“ASCAP”), the Songwriters Guild of America (“SGA”) and Broadcast Music, Inc. (“BMI”) (collectively referred to herein as the “Joint Petitioners”)¹ to reconsider the rules adopted in the Commission’s *Second Report and Order* in the above-

¹ See Joint Petition for Reconsideration of NMPA, ASCAP, SGA, and BMI, CS Docket 97-80, PP Docket No. 00-67 (filed December 29, 2003) (“Joint Petition”).

referenced proceeding that allow unfettered copying and distribution of the audio portion of digital audiovisual programming.²

INTRODUCTION

As the Commission is aware, the recording industry has suffered tremendous economic losses from digital music piracy over the Internet. RIAA is concerned that the broadcast of music in a digital format, whether by radio or television stations, and the transmission of audio material in a digital format by cable networks will become the next vehicles for rampant piracy of copyrighted sound recordings. Such piracy would further aggravate the economic problems of the recording industry, impair the music industry's ability to develop new and diverse artists and music, and reduce the diversity of musical works available to the American public. Thus, rules that permit copying or redistributing of the audio portion of a high definition digital television ("DTV") broadcast in an unprotected format would create economic disincentives to the licensing of such music for use in DTV format. While each content owner will make its own, unilateral decision on licensing, the incentives against granting such licenses found in the proposed rules would tend to undermine one of the principal goals of the rules adopted in the *Second Report and Order*.

Accordingly, RIAA supports the Joint Petitioners' limited request for reconsideration of the Commission's decision to allow the copying and redistribution of musical works

² See *In Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, Second Report and Order and Second Further Notice of Proposed Rulemaking, CS Docket No. 97-80, PP Docket No. 00-67 (rel. Oct. 9, 2003) ("*Second Report and Order*"). RIAA has filed similar comments in support of the Joint Petitioners' petition for reconsideration of the *Report and Order* in the Commission's Broadcast Flag proceeding. See *In re Digital Broadcast Content Protection*, Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 02-230, FCC 03-273 (Nov. 4, 2003).

associated with audiovisual programming. RIAA urges the Commission to adopt the Joint Petitioners' proposal advanced in the Petition as well as their *ex parte* presentation of January 16, 2004. Specifically, the Commission should revise its rules (1) to preclude copying or redistributing of the digital audio portion of a DTV broadcast unless the audio portion is copied and redistributed simultaneously, or synchronously, and in the same manner as the performance of the audiovisual work with which it is associated, *i.e.* the audio is an integral part of the audiovisual work; (2) to provide that the digital audio portion of any DTV broadcast or audiovisual work distributed by entities subject to the plug and play rules may be played back only with and subject to the same copy and distribution limitations as the video portion of the audiovisual work; and (3) to clarify that the provisions of Sections 76.1903 & 76.1904 do not preclude the holders of copyrights in sound recordings and other audio works, or their licensees, from limiting the copying and redistribution of their copyrighted works broadcast by DTV stations or distributed by entities subject to the plug and play rules.

These rule modifications will serve the public interest by preserving consumer expectations with respect to existing audio equipment with digital outputs while preventing the broadcast and cable media from becoming vehicles for undermining the nation's intellectual property rights laws. In order to avoid any delay of the DTV transition, the Commission should not stay the effective date of its rules, as requested by the Joint Petitioners, but should make the revisions applicable to devices manufactured or imported after the effective date of the rule changes.

ARGUMENT

RIAA is the trade association that represents the U.S. recording industry. Its mission is to foster a business and legal climate that supports and promotes its members' creative and financial vitality. Its members are the record companies that comprise the most vibrant national music industry in the world. RIAA members create, manufacture and/or distribute approximately 90% of all legitimate sound recordings produced and sold in the United States. They also have authorized the use of their recorded music in digital music services.

RIAA members have a strong interest in protecting the intellectual property rights of music stored, distributed, broadcast or transmitted in a digital format and preventing the unauthorized sharing or distribution of sound recordings over the Internet. Unless such activities can be prevented, record companies will be unable to recoup the enormous financial investments they routinely make to bring new sound recordings to market and to develop the careers of new artists.

In furtherance of its interests in protecting digital music from unlawful copying and redistribution, RIAA submitted Reply Comments in the Commission's Broadcast Flag proceeding. In those comments, RIAA urged that any content protection rules adopted by the Commission relating to DTV should protect the recording industry's copyright interests in digital sound recordings aired on digital broadcasts, including audio associated with DTV video. RIAA continues to believe that its position in the Broadcast Flag proceeding represents sound public policy and furthers the Commission's public interest mandate without undermining the copyright laws.

Similar concerns also exist with respect to the rules adopted in this proceeding, which are designed to assure the compatibility of DTV receivers and cable systems. Among other

things, the rules set caps on the copy restrictions which could be placed on content distributed by multichannel video programming distributors (“MVPDs”)³ and prohibit the use of selectable output controls and down resolution of broadcast programming by MVPDs. Those rules, while protecting the visual content of audiovisual works, do not afford the same protection for the audio portion of those works. The Joint Petitioners seek reconsideration of this anomalous result.

RIAA supports that request. As noted by the Joint Petitioners, the current rules would permit viewers to strip the digital audio portion from the audiovisual work, copy it or convert it to a digital file and then distribute it easily over the Internet. And, this copying and redistribution can be achieved with a single piece of equipment. Video content providers are permitted to insert copy restrictions to prevent viewers from engaging in the same kinds of activities with respect to the video portion of the channel – even though, as the Joint Petitioners note, the audio portion can frequently be used independently of the video, but rarely can one use the video portion without the audio.⁴ The Commission never explained or justified this anomalous treatment of audio works and it cannot. Indeed, by allowing the audio portion to be copied and redistributed, the Commission has effectively sanctioned audio piracy by leaving the digital audio portion completely unprotected and unprotectable by copyright owners.

³ Specifically, the Commission adopted the following three copy protection caps for different types of programs: (1) unencrypted broadcast television – no copy protection restrictions may be imposed; (2) pay television, non-premium subscription television, and free conditional access delivery transmissions – one generation of copies is the most stringent restriction that may be imposed; and (3) video on demand, pay-per-view or subscription-on-demand transmissions – no copies is the most stringent restriction that may be imposed, and, even when no copies are permitted, such content may be paused up to 90 minutes from its initial transmission. *See Second Report & Order*, ¶ 65.

⁴ *See* Joint Petition at 2.

Moreover, the Commission essentially embraced this unlawful activity by prohibiting cable companies and other MVPD's from transmitting encoded material, unless the encoding satisfied the caps set forth in Section 76.1904. Under that rule, it appears that copyright owners of sound recordings and musical works cannot require that program producers or others who must obtain licenses to use the copyrighted works to include copy protection systems in their programs to protect the copyright holder's intellectual property rights. As a result, the audio portions of audiovisual works transmitted in digital formats are required to be broadcast and transmitted in the clear, open to unfettered copying and distribution.

To address these lapses, the Joint Petitioners propose, among other things, the Commission modify the rules in three ways. First, they propose that the Commission add a new rule prohibiting copying or redistributing in digital form of any audio portion except in synchrony with the performance of an audiovisual work with which it is associated, *i.e.*, the Commission should treat the audiovisual work as a single, integral unit. Second, the Joint Petitioners request that the Commission provide that the digital audio portion of any DTV broadcast or audiovisual work distributed by entities subject to the plug and play rules may be played back only with, and subject to the same copy and distribution limitations, as the video portion of the audiovisual work. This proposal would assure that the audio portion of an audiovisual work is not separated from the video portion. Third, the Joint Petitioners request that the Commission clarify the rules so that the limitations on copy protection in those rules do not apply to the audio soundtrack that is part of an audiovisual work, *i.e.*, the sound recordings and musical works comprising the audio soundtrack of an audiovisual work when asynchronous from the visual portion of such work. This clarification would prevent

entities subject to the plug and play rules from removing copyright protection data or information embedded in such sound recordings or musical works.

RIAA supports these proposals. They strike the appropriate balance between preserving consumer expectations and protecting the intellectual property rights of copyright owners. Under these proposals, consumers who own “home theater” equipment will be able to use that equipment when watching an audiovisual work and to listen to the digital output of the audio material. They will even be able to tape and record in analog format any audio material, just as they do currently with respect to analog broadcasts.⁵ At the same time, the proposal would recognize the interests of copyright owners to protect their works from unauthorized copying and distribution by preventing the digital audio portion from being separated from the audiovisual program.

While the Commission’s mandate is to implement national telecommunications policy, it is manifest, given the charge to regulate in the public interest, that the Commission should not, and cannot, ignore the nation’s copyright laws or act in derogation of them. Where communications policy objectives can be achieved without encroaching on the policies of other national law, the Commission must adopt rules that respect the policies of other federal law.⁶ It has not done so here and should.

⁵ This proposal would thus address the concerns raised by the Motion Picture Association of America (“MPAA”) in its *ex parte* filing in the Broadcast Flag proceeding concerning legacy digital audio devices. See Letter from Fritz A. Attaway, MPAA, to Rick Chessen, FCC (Sept. 29, 2003) (discussing implications of proposed content protection rules on digital audio files).

⁶ Cf. *In re Dismissal of All Pending Pioneer’s Preference Requests*, Order, 12 FCC Rcd. 14,006, ¶ 33 (1997):

It is settled that in reaching its public interest determination, the Commission must attempt to accommodate, to the extent possible under the Communications Act, other federal policies. See, e.g., *National Broadcasting Co. v. United States*, 319 U.S. 190, 222-23 (1943) (Commission should

(Footnote continued on next page)

In their Petition, the Joint Petitioners seek a stay of the current rules while the Commission considers their proposal. RIAA does not support that request; it recognizes the importance of the DTV transition and the Commission's extensive efforts to facilitate that transition. Staying the rules could adversely affect that transition. However, implementation of the Joint Petitioners' proposal does not require a stay; the Commission can adopt their proposal and, as suggested by MPAA in the Broadcast Flag proceeding, make the new rules applicable 18 months after those rules are adopted.⁷ That will facilitate the transition to DTV while assuring that the holders of intellectual property rights in audio material are protected down the road from unfettered copying and distribution.

CONCLUSION

For the reasons set forth above, RIAA requests that the Commission partially grant the Petition for Reconsideration filed by NMPA, ASCAP, SGA and BMI and revise its regulations to afford audio works, including sound recordings, the protection the Joint

(Footnote continued from previous page)
consider purposes of Sherman Act in administering its regulatory powers); *Storer Communications, Inc. v. FCC*, 763 F.2d 436, 443 (D.C.Cir.1985) (Commission must attempt to implement the Communications Act in a manner as consistent as possible with corporate and federal security laws' protection of shareholders' rights); *LaRose v. FCC*, 494 F.2d 1145, 1146-47 n. 2 (D.C.Cir.1974) (Commission should endeavor to reconcile Communications Act and federal bankruptcy law).

⁷ The MPAA petition seeks reconsideration of issues not addressed by the Joint Petitioners or in these Comments.

Petitioners requested. However, in order to avoid any delay of the DTV transition, the revised rules should be made applicable to devices manufactured or imported 18 months after the revised rules are adopted.

Respectfully Submitted,

/s/ Theodore D. Frank

Norman M. Sinel

Theodore D. Frank

Maureen R. Jeffreys

Arnold & Porter LLP

555 12th Street, NW

Washington, D.C. 20007

(202) 942-5000

Counsel for the Recording Industry

Association of America

Cary Sherman

Steven Marks

Recording Industry Association of America,
Inc.

1330 Connecticut Avenue, N.W.

Suite 300

Washington, D.C. 20036

(202) 775-0101

March 10, 2004

CERTIFICATE OF SERVICE

I, Maureen R. Jeffreys, hereby certify that I have on this 10th day of March, 2004, served a copy of the foregoing Comments of the Recording Industry Association of America in Partial Support of Joint Petition for Reconsideration of the National Music Publishers' Association, et al. by First Class U.S. Mail, postage prepaid, to:

Marvin L. Berenson
General Counsel
Broadcast Music, Inc.
320 West 57 Street
New York, NY 10019

Edward P. Murphy
President and CEO
National Music Publishers' Association
475 Park Avenue South, 29th Floor
New York, NY 10016

I. Fred Koenigsberg
Counsel for American Society of Composers,
Authors and Publishers
White & Case, LLP
1155 Avenue of the Americas
New York, NY 10036

Lewis M. Bachman
Executive Director
The Songwriters Guild of America
1500 Harbor Blvd.
Weehawken, NJ 07086

/s/ Maureen R. Jeffreys
Maureen R. Jeffreys